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No. _____

In The

Supreme Court of the United States

October Term, 1988

DENNIS BURNHAM,

Petitioner,

vs.

CALIFORNIA SUPERIOR COURT,
COUNTY OF MARIN,

Respondent,

FRANCIE BURNHAM,

Real Party in Interest.

On Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Five

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is service of process on a non-resident defendant, while he is physically present in the forum state, a sufficient basis by itself for the exercise of personal jurisdiction?

Traditionally, physical presence in the state was sufficient to confer personal jurisdiction over the defendant, if he was served while in the forum. The question presented is whether that rule is still viable, in light of this Court's decision in *Shaffer v. Heitner*, 433 U.S. 186 (1978).

Although *Shaffer* did not involve service on a defendant who was present in the forum, this Court's opinion stated that the constitutionality of all exercises of state court jurisdiction must be tested by whether the non-resident defendant had sufficient contacts with the forum state to satisfy due process. Federal courts, and state courts, are in conflict on this constitutional issue, and have drawn different conclusions from *Shaffer* on the subject. The California Court of Appeal in the present case held that such service is still sufficient to establish personal jurisdiction.

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PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution:

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall

any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure, section 410.10:

A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

DECISIONS BELOW

The trial court's original ruling was that California did not have personal jurisdiction over petitioner. (Appendix A.) It reconsidered that order, decided that personal jurisdiction existed, and denied petitioner's motion to quash service. (Appendix B.).

The California Court of Appeal, First Appellate District, Division Five, upheld the trial court in an unpublished decision. (Appendix C.) The California Supreme Court denied a petition for review. Justice Edward A. Panelli was of the opinion that review should have been granted. (Appendix D.)

JURISDICTION AND TIMELINESS

The California Supreme Court denied the petition for review on June 8, 1989. Petitioner invokes this court's certiorari jurisdiction under 28 U.S.C., section 1257 (3). *Kulko v. California Superior Court*, 436 U.S. 84, 90 fn. 4 (1977).

The decision of the California Court of Appeal is a final determination on the federal constitutional issue because it determined that California has personal jurisdiction over petitioner. Under California law, petitioner has no choice but to suffer a default judgment, or to enter a general appearance and defend on the merits, thus waiving his right to contest jurisdiction. *McCorkle v. City of Los Angeles*, 70 Cal.2d 252, 258; 74 Cal.Rptr. 389; 449 P.2d 453 (1969). Such a ruling is final for the purpose of this Court's jurisdiction. *Shaffer v. Heitner*, 433 U.S. 186, at 195 Fn. 12 (1977).

STATEMENT OF THE CASE

Petitioner Dennis Burnham (hereafter "husband") and real party in interest Francie Burnham (hereafter "wife") married in 1976 and moved to New Jersey in 1977. Their children were born in New Jersey and the family lived there until the parties separated in 1987.

Husband and wife executed a marital settlement agreement in New Jersey in 1987. It provided for a division of marital property, custody of the children to wife, reasonable and liberal visitation with the children to husband, alimony and child support. The agreement stated that it was to be interpreted in accordance with New Jersey law.

Shortly after executing the agreement, with husband's consent, wife and the children moved to California. Husband remained in New Jersey and filed for divorce, based on the agreement. Wife then took the position that the agreement was invalid, and that all of

their marital rights should be litigated in California. She filed the underlying action and had husband personally served, while he was in California to visit with their children.

Husband appeared specially and made a motion to quash service of summons. He argued that: (1) under *Shaffer v. Heitner, supra,* 433 U.S. 186, service on him while he was in California could not confer personal jurisdiction in the absence of sufficient contacts with California to satisfy due process; and (2) he did not have sufficient contacts with California, for it to exercise personal jurisdiction over him under *Kulko v. California Superior Court, supra,* 436 U.S. 84 and similar decisions.

New Jersey is where husband resides, works, votes, files state income tax returns, has his driver's license, registers his vehicles, and maintains all of his bank accounts. Husband has never been a resident or a domiciliary of California. He has never voted in California and has never filed a California state income tax return. Husband has never owned any real property or any personal property in California. He does not have a license to do business in California, does not pay any sales tax in California, and does not have a business address in California.

Wife consistently took the position that she did not have to satisfy the minimum contacts test. She relied on section 28 of the Restatement, Conflict of Laws, for the principle that "a state has power to exercise judicial jurisdiction over an individual who is present within its territory, whether permanently or temporarily." She argued that service by itself is a sufficient basis for personal

jurisdiction, and that *Shaffer* did not change the law in this regard. She stated: "While counsel for [husband], or anyone else, may speculate regarding what the U.S. Supreme Court *might* do when the question is properly presented to it, the fact is that the Supreme Court has never abrogated the principle set forth in Restatement § 28." (Emphasis in original.)

The trial court originally held that husband was not subject to personal jurisdiction in California. (Appendix A.) Wife requested reconsideration. The parties again argued over whether service on husband while he was physically present in the state could be a basis for personal jurisdiction. The trial court specifically asked husband's counsel if she knew of any decisions on this issue " . . . in which the husband or the defendant was served in the State of California." Husband's counsel was not aware of any. The trial court then changed its mind. It found that California had personal jurisdiction and denied husband's motion to quash. (Appendix B.)

Husband filed a petition for writ of mandate in the California Court of Appeal on November 8, 1988. The Court of Appeal denied it on April 7, 1989. (Appendix C.) Its decision stated that " . . . personal presence continues to be a valid jurisdictional predicate for in personam jurisdiction, and that *Shaffer v. Heitner, supra,* 433 U.S. 186 does not compel a contrary conclusion."[1]

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[1] The Court of Appeal decision noted that husband came to California for the dual purpose of visiting his children and doing business. It did not, however, uphold the exercise of personal jurisdiction on this basis. Rather, it was responding to

(Continued on following page)

Husband sought review in the California Supreme Court. His petition was denied on June 8, 1989. Justice Edward A. Panelli was of the opinion that the petition should have been granted. (Appendix D.)

REASONS FOR ISSUING THE WRIT

I. THIS COURT SHOULD DECIDE WHETHER A STATE COURT CAN EXERCISE PERSONAL JURISDICTION OVER A NON-RESIDENT DEFENDANT, SOLELY BECAUSE HE WAS SERVED WITH PROCESS WHILE HE WAS PHYSICALLY PRESENT IN THE FORUM.

A. This Court's Reasoning In *Shaffer v. Heitner* Suggests That Jurisdiction Based Solely On Service On A Non-Resident While He Is Physically Present In The Forum State Is No Longer Constitutional.

Traditionally, service of process on a non-resident defendant while he was physically present in the state was sufficient to confer personal jurisdiction over him for all purposes. The theory underlying this view was that a

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husband's argument that exercising jurisdiction on this basis would thwart California's public policy of encouraging visitation. Nor could the Court of Appeal have done so constitutionally upheld jurisdiction on any basis other than the fact that husband was served while in California. Wife's family law action was unrelated to husband's minimal business contacts with California. He would attend trade shows in California in order to defray some of the expenses of traveling across the country to visit his children. This is discussed briefly in section II.A. below.

state has power over anyone who is found within its boundaries. That notion has long been subjected to cogent criticism. See, e.g., Leflar et al., *Transient Jurisdiction – Remnant of Pennoyer v. Neff: A Round Table,* 9 J.Publ.L. 281 (1960); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens,* 65 Yale L.J. 289 (1956).

The question presented here is whether the traditional view was fatally undermined by the reasoning of this Court's decision in *Shaffer v. Heitner, supra,* 433 U.S. 186 and should now be explicitly rejected.

Shortly after *Shaffer* was decided, one commentator explained why *Shaffer* sounded the death knell for the traditional view of personal jurisdiction based on service in the forum. Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction,* 25 Vill.L.Rev. 38 (1979). Numerous subsequent articles have questioned the continued validity of the traditional view, but this court has yet to address the subject. See list of articles in *Nehemiah v. Athletics Congress of U.S.A.,* 765 F.2d 42, 47 (3d Cir. 1985) where the Third Circuit stated that a growing number of commentators have reached the conclusion that after *Shaffer,* " . . . it is difficult to find a basis in logic and fairness" for the traditional rule.

As discussed below, decisions of the federal and state courts are in conflict on the question. The California Court of Appeal decision here cited the line of authorities which supported its conclusion, and ignored the contrary authorities.

A decision by this court is necessary because the issue is an important and recurring one. In our highly

mobile society, people often travel to another state for a variety of reasons. They have the right to know whether they can be subjected to extensive litigation, if they are served while visiting the state chosen by the plaintiff as the forum. A brief reflection on how this Court reached its decision in *Shaffer* will serve to explain why the traditional rule is ripe for rejection.

In *Shaffer*, the plaintiff filed a stockholder's derivative suit in Delaware against Greyhound Lines, Inc. He claimed that the defendants had engaged in activities in Oregon which resulted in damages being assessed against Greyhound in an anti-trust action. The basis for his assertion of jurisdiction over the defendants was that they owned stock in the corporation, which was located in Delaware, as a matter of law under Delaware statutes. Delaware held that it could exercise "quasi in rem" jurisdiction over the defendants, based on their stock being located in Delaware. It was therefore not necessary for the defendants to have had any other contact with Delaware. At pp. 189-195.

This Court reversed. It held that the presence of property in a state is insufficient to give it personal jurisdiction over a non-resident. Rather, whether Delaware could constitutionally exercise jurisdiction depended on whether the defendants had sufficient contacts with the state, to make its exercise of jurisdiction fair and reasonable under all of the circumstances. At pp. 195, 212, 217.

Shaffer first reviewed the evolution of jurisdictional concepts, starting with *Pennoyer v. Neff*, 95 U.S. 714 (1878). At pp. 196-206. It held that the identical principles which

apply to personal jurisdiction on the basis of a non-resident's activities in the forum should now apply when jurisdiction is asserted on the basis of property ownership in a state. At pp. 207-212. It concluded that " . . . all assertions of state court jurisdiction must be evaluated by the standards set forth in *International Shoe* and its progeny." At p. 212, emphasis added. Thus, the mere presence of property in the state is no longer sufficient by itself to give the state any jurisdiction over the property owner, except perhaps for causes of action which directly arise out of the property ownership itself. At pp. 207-208, 213.

Shaffer thus destroyed the foundation for the view that service on a non-resident defendant while he is present in the state will suffice. The reason that personal service was traditionally considered sufficient to permit jurisdiction, is the very reason that was rejected in *Shaffer*. Traditionally, a state was said to have power over any person or property found within its territorial boundaries. The mere presence of the person, or the property, was sufficient to give the state such power. See discussion in *Shaffer* at pp. 196-200.

Shaffer established that the mere presence of property in a state is not an adequate basis for quasi in rem jurisdiction. By parity of reasoning, the physical presence of a non-resident in a state can no longer be deemed constitutionally sufficient to permit personal jurisdiction over him. The question in all situations must be whether the non-resident defendant has sufficient contacts with the state to make the litigation there appropriate.

B. The Decisions Are In Conflict On What Implication To Draw From *Shaffer.*

Contrary to the statement in the California Court of Appeal's decision, other jurisdictions do not all support retention of the traditional view. In fact, the decisions are in conflict on this issue.

In *Nehemiah v. Athletics Congress of U.S.A., supra,* 765 F.2d 42 (*not* cited by the Court of Appeal) the Third Circuit interpreted *Shaffer* as undermining the traditional rule. It held, by analogy, that service on an agent for an unincorporated association while he was present in the forum did not give the state jurisdiction over the association. At p. 47.

Harold M. Pitman Co. v. Typecraft Software, 626 F.Supp. 305, 310-313 (N.D.Ill. 1986) (*not* cited by the Court of Appeal) made a thoughtful analysis of *Shaffer.* It concluded that service on a defendant in the forum no longer by itself confers personal jurisdiction. It stated that the test must now be "whether the defendant has had minimum contacts with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." At p. 312.

Bershaw v. Sarbacher, 700 P.2d 347, 349 (Wash.App. 1985) (*not* cited by the Court of Appeal) held that under *Shaffer,* personal service on the defendant while he was present in the state was insufficient in a family law context. There, a paternity action was served on the defendant while he was visiting the plaintiff and the child in Washington. The trial court granted his motion to dismiss for lack of personal jurisdiction, and the Washington

Court of Appeals affirmed. See also *In re Marriage of Markowski,* 749 P.2d 754, 756 fn. 2 (Wash.App. 1988).

The California Court of Appeal here relied on *Donald Mantor Co., Inc. v. Davis,* 543 f.2d 419 (1st Cir. 1976) and *Aluminal Industries, Inc. v. Newtown Commercial Assoc.,* 89 F.R.D. 326, 329 (S.D.N.Y. 1980). Both of these decisions held that personal service on the non-resident defendant while he was present in the forum was sufficient. *Mantor,* however, was decided before *Shaffer. Aluminal* relied on *Mantor* without making any analysis.

In *Amusement Equipment, Inc. v. Mordelt,* 779 F.2d 264 (5th Cir. 1985) (cited by the Court of Appeal), the Fifth Circuit undertook an analysis of the problem, and embraced a variant of the traditional view. At pp. 267-270. It thought that *Shaffer* did not overturn the traditional view, but stopped short of holding that service, without more, is automatically sufficient in all cases. At p. 270, fn. 15.

Rittenhouse v. Mabry, 832 F.2d 1380, 1388-1389 (5th Cir. 1987) subsequently described *Amusement Equipment* as having reaffirmed the constitutionality of the traditional view. It upheld the exercise of jurisdiction simply because the defendant was served in the forum.

In *Cariaga v. Eighth Judicial Dist. Court,* 762 P.2d 886 (Nev. 1988) (cited by the Court of Appeal), the Nevada Supreme Court embraced the traditional view. It noted that in spite of *Shaffer* this Court has never explicitly held that a showing of minimum contacts is necessary to establish jurisdiction if the defendant is served while he is present in the forum. (At pp. 887-888.)

The California Court of Appeal also relied on *Oxmans' Erwin Meat Co. v. Blacketer,* 273 N.W.2d 285 (1979). It did not reach the issue because the facts of the case did not require it. At p. 287. The opinion actually noted that the authors of the draft of the Restatement Second of Judgments considered *Shaffer* to have undermined service on the defendant while present in the state as being a permissible basis for personal jurisdiction.[2] At p. 287, fn. 4.

C. This Issue Has An Especially Important Impact On Divorced Families With Children.

This jurisdictional issue has national significance for litigation of all types, because it can impact on any person who travels to another state for any reason. See, e.g., *Cariaga v. Eighth Judicial Dist. Court, supra,* 762 P.2d 886, where Nevada exercised jurisdiction over a non-resident defendant in an action arising out of a slip and fall accident which had occurred at the defendant's home in California, simply because the defendant was served when he came as a tourist to Nevada to visit friends.

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[2] The recent 1986 draft of revisions to the Restatement Second, Conflict of Laws section 28, contains an extensive discussion of *Shaffer.* At pp. 40-42. It notes that *Shaffer* held that the presence of property in a state only gives the state jurisdiction in situations where it would be reasonable. The drafters therefore concluded: "It must likewise follow that considerations of reasonableness qualify the power of a state to exercise personal jurisdiction over an individual on the basis of his physical presence within its territory. . . . Jurisdiction will be lacking, however, when the sole basis for its exercise is the momentary presence within the state of the individual involved unless the special circumstance of the case make its exercise reasonable." At p. 41.

The issue arises here in a context which has a major impact on an important public policy: encouraging parents to spend time with their children who live in another state. If personal jurisdiction for all purposes can be obtained by the simple device of serving a non-resident parent while he is in a state for the purpose of spending time with his children, the policy of encouraging parental visitation with children will be thwarted. To set the family aspect of this problem in perspective, a brief overview of jurisdictional concepts in that area will prove helpful.

A state can terminate a marriage without personal jurisdiction over the non-resident spouse because the presence of one spouse alone gives a state jurisdiction over marital status. *Williams v. North Carolina,* 317 U.S. 287 (1942). A state can also adjudicate issues regarding child custody and visitation, if the conditions of the Uniform Child Custody Jurisdiction Act are met because this is a question of subject matter jurisdiction and again only involves status. See, e.g., California Civil Code, §§ 5150 et seq. and *Kumar v. Superior Court,* 32 Cal.3d 689, 695-702; 186 Cal.Rptr. 772; 652 P.2d 1003 (1982).

Jurisdiction for those limited purposes does not give a state personal jurisdiction over a non-resident spouse or parent for any other matters. A state court cannot divide property and make orders for child support, spousal support, or attorney's fees, unless it has personal jurisdiction over the non-resident. *Kulko v. California Superior Court, supra,* 436 U.S. 84.

It has been recognized that it would discourage parents from visiting their children, if that conduct could subject them to family law litigation in the state. See, e.g.,

Kumar v. Superior Court, supra, 32 Cal.3d 689, at pp. 703-704. In *Kulko,* the non-resident parent was not personally served in the forum state. Nevertheless, the result in *Kulko* certainly would not have been different if the father had traveled to California to visit his children and been served while he was there.[3]

II. THERE IS NO OTHER BASIS FOR CALIFORNIA'S EXERCISE OF PERSONAL JURISDICTION OVER HUSBAND, AND WIFE HAS OTHER ADEQUATE REMEDIES.

Wife's answer to husband's petition for review in the California Supreme Court took the position that California had personal jurisdiction apart from the service on husband while he was in California to visit the children. She also argued that husband should be denied any relief because he was not paying her support. Husband expects wife to make these same assertions in her answer to this petition. In order to facilitate this court's decision on whether to grant certiorari, husband will briefly explain why wife's positions have no merit.

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[3] The California Court of Appeal in the present case seemed to think that exercising personal jurisdiction would not discourage husband from spending time with his children because he was coming to California for business reasons. This was incorrect because husband's business in California was only to attend trade shows, which he arranged in a manner that would minimize his expenses in traveling across the country to visit with his children. Moreover, as explained in section II.A., these business contacts do not permit the exercise of personal jurisdiction over husband in wife's family law action.

A. California Does Not Have Personal Jurisdiction Over Husband Based On His Contacts With California.

As an alternative argument, wife contended that husband had sufficient contacts to satisfy *Kulko* because he did some business in California. This is incorrect, for the following reasons.

California's long arm statute, Code of Civil Procedure section 410.10, permits it to exercise personal jurisdiction on any basis which satisfies the United States Constitution. Under this law, doing business in a state only permits the exercise of personal jurisdiction on causes of action which arise out of that business. *McGee v. International Life Ins. Co.,* 355 U.S. 220, 223 (1958). See also, the Judicial Council Comments to California Code of Civil Procedure section 410.10. West's Annotated Code, p. 468 (1973).

Wife's family law action certainly does not arise out of what little business contact husband had with California. See, e.g., *Judd v. Superior Court,* 60 Cal.App. 3d 38, 44; 131 Cal. Rptr. 246 (1976) where the California Court of Appeal made this point in the context of a family law action. California has recognized that it also does not have jurisdiction over a non-resident parent who combines his trips here to visit his children with some business. *Modlin v. Superior Court,* 176 Cal.App. 3d 1176, 1179-1182; 222 Cal.Rptr. 662 (1986).

Nor are husband's contacts sufficient to give California "general" jurisdiction over a cause of action that does not arise out of his business. Such jurisdiction only exists when the defendant's contacts with the forum state are

wide-ranging, continuous, and substantial. *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 445-449 (1952). That did not occur here. For instance, in *Cornelison v. Chaney*, 16 Cal.3d 143, 146-149; 127 Cal.Rptr. 352; 545 P.2d 264 (1976) general jurisdiction was not exercised over a defendant who had an abundance of contacts with California which were far greater than husband had here.

Husband's business contact with California here was insufficient to meet the minimum contacts test of *Kulko*. Indeed, the trial court originally concluded that husband did not have sufficient contacts, and held California did not have personal jurisdiction over him. (Appendix A2.) Wife made a motion for reconsideration, which argued that the minimum contacts test did not have to be met because husband was served while he was physically present in California. The trial court then changed its mind. (Appendix B3.) Thus, if husband had not been served in California, his challenge to jurisdiction would have been sustained.[4]

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[4] The trial court's order states that it also considered the New Jersey trial court's refusal to exercise jurisdiction. (Appendix B3.) Nothing in the New Jersey order adjudicates whether California can exercise personal jurisdiction over husband. The sole issue before the New Jersey court was whether it should dismiss husband's divorce action because he had not complied with a New Jersey statute, which requires a summons to be served within ten days after it is issued. Husband appealed from the New Jersey order because the trial court there had the discretion to allow him to proceed with the action.

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The Court of Appeal explicitly upheld personal jurisdiction over husband on the ground that service on a non-resident defendant while he is in the forum is still a valid basis for the assertion of personal jurisdiction after *Shaffer*. (Appendix C5.) Thus, the federal constitutional issue is directly and cleanly presented by the present case. Any attempt by wife to cloud the issue should be rejected.

B. Wife Has Other Adequate Remedies.

After it denied husband's motion to quash, the California trial court made an order for temporary support and attorney's fees. Husband did not comply with that order and he was held in contempt. Sentencing was deferred to give husband an opportunity to attempt to overturn California's assertion of personal jurisdiction. If California does not have personal jurisdiction over husband, then the underlying order is invalid and the contempt would have to be annulled.[5]

On June 30, 1988, the trial court stayed all further proceedings in California while this court considers husband's petition for writ of certiorari, on the condition that

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The only part of the New Jersey order which touches on the issue of jurisdiction is its comments regarding where child custody and visitation should be litigated under the Uniform Child Custody Jurisdiction Act. It thought that those issues should be resolved in California. Which state would be a better forum for those issues has nothing to do with the federal constitutional issue presented here.

[5] The contempt determination was never reduced to a formal written order.

husband pay wife an amount equal to what becomes due under the temporary support order. On July 5, 1989, husband sent wife a check for $37,400, in compliance with that ruling. Under California Civil Code section 4356, and Code of Civil Procedure sections 418.10, subdivision (d) and 418.11, these aspects of the litigation do not constitute a general appearance by husband.[6]

Nonetheless, wife might continue to argue that the ruling which husband challenges should be upheld on "fairness grounds". This is not a reason for refusing to grant certiorari, for several reasons.

First, as pointed out above, husband is now paying wife funds equivalent to the amounts ordered for temporary support and attorneys fees in California. Second, New Jersey provides a forum in which wife can obtain further orders if necessary. In fact, wife is ably represented by New Jersey counsel, who is actively resisting husband's attempt to proceed with his divorce action in New Jersey.

This court made a similar point in *Kulko*. There, the mother sought an increase in child support in California, after the children moved there. This Court held that California did not have personal jurisdiction over the father, who had remained in New York. In rejecting the mother's argument that California should have jurisdiction because of its interest in insuring that children who reside in the state receive adequate support, this Court

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[6] The stay order had not been reduced to writing by the time this petition was printed, and therefore could not be included in the appendix.

pointed out that the mother could institute an action in New York to obtain child support. 436 U.S. at pp. 98-100.

Third, the parties' marital settlement agreement requires husband to pay alimony, child support, and other substantial sums to wife. No court has actually invalidated that agreement. The California trial court has not yet considered whether the agreement should be invalidated. The New Jersey trial court in husband's divorce action criticized the agreement, but the issue of its validity was not before it. None of that court's comments has any res judicata effect on the validity of the agreement.[7]

Husband made all payments due under the agreement from the time that it was executed until six months after wife claimed that it was invalid and instituted the underlying family law action in California. While wife's California action has been pending, husband has been depositing the amounts due under the agreement into an escrow in New Jersey. Those funds, less what husband will have paid to wife as a result of the condition the trial court imposed when it stayed all further proceedings in California, can be made available to wife if appropriate agreements are made so that husband does not concede California's jurisdiction and he is allowed to spend time with his children there.

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[7] The New Jersey court could not have set aside the agreement because it never took jurisdiction over the case. Indeed, it recognized it was not actually ruling on the validity of the agreement. It stated that child custody might become a dispute, " . . . *should* a court find the property settlement agreement unenforceable." (Emphasis added.)

The reality is that wife decided to forum shop. She simply prefers to litigate against husband in California. If wife were dissatisfied with the marital settlement agreement, she could have, and should have, challenged it in the New Jersey courts before she left there and came to California. See *Kulko v. California Superior Court, supra,* 436 U.S. 84, 97 [basic considerations of fairness point to litigating in the defendant's home state when it was the wife who left the marital domicile].

Thus, wife's lack of funds, if any, is really a "self-inflicted wound". It should not be used as a basis for denying husband's legitimate claim that the United States Constitution prohibits California from exercising personal jurisdiction over him.

CONCLUSION

For all of the foregoing reasons, and based on the foregoing authorities, it is respectfully submitted that certiorari be granted and that this court hold that California cannot exercise personal jurisdiction over husband.

Dated: June 30, 1989

Respectfully submitted,

RICHARD SHERMAN
DE GOFF AND SHERMAN

CECILIA LANNON

BY RICHARD SHERMAN

Counsel of Record
for Petitioner
Dennis Burnham

APPENDIX A

CASE NUMBER: FL 1003

(Filed Sep. 8, 1988)

ROBERT L. NELSON (415) 479-1911
A PROFESSIONAL CORPORATION
35 Mitchell Blvd.
San Rafael, CA 94903
ATTORNEY FOR *(Name):* Petitioner Francie Burnham

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF MARIN

PETITIONER: FRANCIE BURNHAM

RESPONDENT: DENNIS BURNHAM

FINDINGS AND ORDER AFTER HEARING

* * *

Motion to Quash Service of Summons/Dismiss the Action

This proceeding was heard as follows:

1. Date: 6-30-88
   Dept.: 6
   Judge: Richard H. Breiner
   Attorney present in court: Robert L. Nelson
   Attorney present in court: Cecilia D. Lannon

   * * *

   On the Motion filed 4-12-88
   By: Respondent Dennis Burnham
2. Evidence was presented and the matter was submitted.

* * *

19. Respondent's Motion to Quash Service of Summons and to Dismiss is denied, since the Court finds that it has jurisdiction over the marital status, and therefore summons cannot be quashed. However, the

court finds that it has no personal jurisdiction over respondent over any other issue except for marital status.

Date: September 8, 1988 /s/ Richard H. Breiner
JUDGE OF THE SUPERIOR COURT

* * *

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

In re the Marriage of	) No. FL 1003
Petitioner: FRANCIE BURNHAM	) ORDER GRANTING MOTION FOR RECONSIDERATION, VACATING SEPTEMBER 8 ORDER AND DENYING MOTION TO QUASH
and	)
Respondent: DENNIS BURNHAM	)
_____	) (Filed Oct. 5, 1988)

Having heard petitioner's motion to reconsider and reviewing the entire file, including particularly the order of the New Jersey Superior Court refusing to exercise jurisdiction and the statement of reasons set forth in the June 3, 1988 order of that Court, and for good cause,

IT IS HEREBY ORDERED:

1. That petitioner's motion for reconsideration is granted.

2. That on reconsideration, this Court's Order filed September 8, 1988 is vacated.

3. That respondent's motion to quash is denied in its entirety.

4. That the court finds, based on the evidence submitted, that it has jurisdiction, both *in rem* and *in personam*, over the subject matter and the parties, respectively.

DATED: OCTOBER 5, 1988

/s/ Richard H. Breiner
RICHARD H. BREINER
Judge of the Superior Court

APPENDIX C

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION FIVE

DENNIS BURNHAM, Petitioner, v. SUPERIOR COURT, COUNTY OF MARIN, Respondent, FRANCIE BURNHAM, Real Party in Interest.	A044090 Marin County Superior Court No. FL1003 (Filed Apr. 7, 1989)

BY THE COURT:

After full briefing and consideration of the issues raised therein, as well as the court's independent research, the petition for writ of mandate is denied. The court concludes that personal presence continues to be a valid jurisdictional predicate for *in personam* jurisdiction, and that *Shaffer v. Heitner* (1977) 433 U.S. 186 does not compel a contrary conclusion. As the trial court noted, no California or United States Supreme Court case has applied *Shaffer's* "minimum contacts" analysis to a defendant present in the forum state and personally served with process. Those cases which have considered the issue have ruled that *Shaffer* does not preclude a finding of personal jurisdiction based on presence. (See, e.g., *Amusement Equipment, Inc. v. Mordeldt* (5th Cir. 1985) 779 F.2d 264; *Aluminal Industries v. Newtown Commercial Assoc.* (S.D.N.Y. 1980) 89 F.R.D. 326; *Cariaga v. District Court*

(Nev. 1988) 762 P.2d 886; *Oxmans' Erwin Meat Co. v. Blacketer* (Wis. 1979) 273 N.W.2d 285; see also *Donald Manter Co., Inc. v. Davis* (1st Cir. 1976) 543 F.2d 419.)

In light of the evidence presented to the trial court that petitioner's within California was for the dual purposes of visitation and conducting business activities, the imposition of personal jurisdiction in this case will not act to discourage parental visitation. (Cf. *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 45.)

APPENDIX D

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

First Appellate District, Division Five, No. A044090
S009795

(Filed June 8, 1989)

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

DENNIS BURNHAM, Petitioner

v.

MARIN COUNTY SUPERIOR COURT, Respondent

FRANCIE BURNHAM, Real Party In Interest

Petition for review DENIED.

Panelli, J., is of the opinion the petition should be granted.

/s/ LUCAS
Chief Justice